STATE OF MICHIGAN

IN THE SUPREME COURT

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., a New York Corporation, Individually, and as Subrogor of DVA AMBULANCE, INC.,

Plaintiffs/Appellants,

v

DONALD JEFFREY YORK,

Defendant/Appellee.

_____/

Supreme Court No. 121968

Court of Appeals No. 227917
Lower Court No. 98-2851-CK
Shiawassee County Circuit

121968 Signed

BLANCO MILLER, P.C.
ORLANDO L. BLANCO (P34480)
KEVIN E. SRALLA (P61024)
Attorneys for Plaintiffs/Appellants
50 W. Big Beaver, Suite 320
Troy, MI 48084
(248) 519-9000

FOSTER, SWIFT, COLLINS & SMITH, P.C.
WILLIAM R. SCHULZ (P29147)
Attorney for Defendant/Appellee
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

_____/

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

BLANCO MILLER, P.C.
ORLANDO L. BLANCO (P34480)
KEVIN E. SRALLA (P61024)
Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES: **PAGE(S)**

STATUTES:

OTHER:

I. MCL 500.3135(3)(a) IS UNAMBIGUOUS AND SUFFICIENTLY BROAD TO INCLUDE RECKLESS CONDUCT.

The intentional tort exception to the shield of immunity granted by Michigan's No-Fault Act is unambiguous, and plainly drafted to contemplate reckless behavior as falling within the broad definition of an "intentional" act. MCL 500.3135(3)(a) provides, in pertinent part:

> Notwithstanding any other provision of law, tort liability arising from ownership, maintenance, or use within this State of a motor vehicle...is abolished except as to:
>
> (a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person...or for the purpose of averting damage to tangible property.

When interpreting a statute, the primary goal is to ascertain and give effect to the intent of the Legislature. People v Chavis, 468 Mich 84, 92, 658 NW 2d 469 (2003). Such analysis begins with an examination of the plain language of the statute. If the language is clear and unambiguous, no further construction is necessary, and the statute is enforced as written. Id.; Wickens v Oakwood Healthcare Sys, 465 Mich 53, 60, 631 NW 2d 686 (2001).

The statute must, however, be examined as a whole enactment, and not interpreted in a void. West Bloomfield Hosp v Certificate of Need Bd, 452 Mich 515, 523, 550 NW 2d 223 (1996). When courts interpret particular provisions,

they must, whenever possible, construe the phrase in such a way that interpretation does not conflict with, or deny effect to, other portions of the statute. Piper v Pettibone Corp, 450 Mich 565, 572, 542 NW 2d 269 (1995).

The first sentence of sub-section (3)(a) references "***intentionally caused harm*** to persons or property." (Emphasis added.) Black's Law Dictionary defines "intentionally" as follows:

> To do something purposely, and not accidentally. Person acts "intentionally" if he desires to cause consequences of his act or ***he believes consequences are substantially certain to result***.

Black's Law Dictionary, 6th ed., 1990. (Emphasis added.)

"Intention" is similarly defined as the:

> Determination to act in a certain way or to do a certain thing. Meaning; will; purpose; design. ... When used with reference to civil and criminal responsibility, ***a person who contemplates any result, as not unlikely to follow from a deliberate act of his own, may be said to intend the result, whether he desires it or not.***

Black's Law Dictionary, 6th ed., 1990. (Emphasis added.)

Thus, the standard definition of "intentional" conduct encompasses reckless behavior. It includes that individual who acts deliberately despite knowledge that harm is likely to result from his actions.[1] See Burnett v City of Adrian, 414 Mich 448, 455, 326 NW 2d 810 (1982) (holding that acting with an indifference to whether harm will result equates to a willingness that it does.)

[1] To be sure, "Reckless Driving" is defined, in pertinent part, as "a conscious and ***intentional*** driving which driver knows, or should know, creates unreasonable risk of harm to others, even though he has no actual intent to harm." Black's Law Dictionary, 6th ed., 1990. (Emphasis added.) Here, again, recklessness is equated with an intentional act. Such a definition further reinforces the plain reading of the statute urged above. A person who makes a conscious decision to drive under the influence of alcohol or drugs commits an intentional act and is not subject to the immunity from liability provided by the No-Fault Act.

Such a tortfeasor's acts are "intentional," within the meaning of sub-section (3)(a).

The plain language of the second sentence precludes a narrower interpretation of the phrase, "intentionally caused harm," as used in the first sentence. To wit, the effect of the second sentence is to say that "intentionally caused harm" does not encompass recklessness[2], where the individual acts "for the purpose of averting injury to any person ... or ... averting damage to tangible property." This usage plainly suggests that reckless behavior is otherwise "intentional," giving rise to "intentionally caused harm." If reckless behavior were not otherwise "intentional," it would be pointless to delineate a class of reckless behavior (acting to avert harm) that does *not* rise to the level of intentional conduct. There would be no point in the qualifying phrase of the second sentence.

In other words, the text of sub-section (3)(a) plainly requires that recklessness, when it comes in the form of acting to avert harm, does not represent the kind of "intentional" act contemplated in the first sentence. It follows logically that all other occurrences of recklessness *would, in fact,* qualify as "intentional" under subsection (3)(a). Otherwise, if *all* recklessness were beyond the scope of intentional, there would be no need to carve out an exception for a

[2] A person who acts knowing "that harm to persons or property is substantially certain to be caused by his or her act or omission" commits what is commonly understood as a reckless act, under Michigan law. To wit, Black's Law Dictionary provides: "For conduct to be "reckless", it must be such as to evince disregard of, or indifference to, consequences, under circumstances including danger to life or safety to others, although no harm was intended. Thus, the second sentence of sub-section (3)(a) speaks to recklessness.

particular kind of recklessness, as the Legislature clearly did with the second sentence of subsection (3)(a).

To delimit the scope of "intentionally caused harm" to exclude recklessness would render meaningless the entire second sentence of subsection (3)(a). No part of a statute should be treated as mere surplusage or rendered nugatory. In re MCI Telecom Complaint, 460 Mich 396, 411, 596 NW 2d 164 (1999). No text should be read to "deny effect" to another provision of the statute. Piper, supra, at 572. Therefore, the only plausible (and thus "plain") reading of subsection (3)(a) is one that defines "intentionally caused harm" broadly, to encompass recklessness generally, excepting only acts of recklessness taken to avert harm.

II. "WILLFUL AND WANTON" CONDUCT IS MORE CULPABLE THAN "RECKLESSNESS" AND THEREFORE FALLS EASILY WITHIN THE SCOPE OF "INTENTIONAL" CONDUCT CONTEMPLATED BY THE LEGISLATURE IN §3135(3)(a).

Black's Law Dictionary defines "willful and wanton misconduct," in pertinent part, as follows:

> Conduct which is committed with an intentional or reckless disregard for the safety of others or with an intentional disregard of a duty necessary to the safety of another's property. Failure to exercise ordinary care to prevent injury to a person who is actually known to be or reasonably expected to be within the range of a dangerous act being done.

Black's Law Dictionary, 6th ed., 1990.

Thus, willful and wanton misconduct occurs when one *intentionally* disregards another's safety. According to the plain language of Black's, and

substantial Michigan case law, such misconduct is at least equal to reckless behavior and reaches closer to "actual intent" than mere recklessness on a continuum of intentional behavior. Thus, if "intentional" as used in §3135(3)(a) is broad enough to encompass mere reckless behavior – as shown by the discussion in Section I – it necessarily swallows "willful and wanton misconduct", which is closer than recklessness to the "intentionally caused harm" end of the continuum.

Well-settled case law in Michigan bears out this truth. The Legislature clearly contemplated the inclusion of "*willful and wanton misconduct*" in the definition of *intentionally caused* harm, when it drafted subsection (3)(a).

In Citizens v Lowery, 159 Mich App 611, 407 NW2d 55 (1987), the 15 year-old son of the Defendant Lowery had stolen a vehicle owned by Citizen's insured, Frances S. Kinkle. In Lowery, the trial court had found that the 15 year-old minor had operated the vehicle in a manner which was "reckless to the point of being willful and wanton misconduct", resulting in damage to the Citizens' insured vehicle and a garage. Citizens paid the collision loss on the insured vehicle and also paid No-Fault property protection benefits to the owners of the damaged garage and a parked car. Citizens, then, as subrogee of its insured, brought an action under the parental liability statute to recover a portion of the damages it had paid out as property insurer. Id.

As in this case, the Defendant in Lowery argued that its liability had been abolished by the provisions of the No-Fault Act, citing to the Court MCL

500.3135; 24.13135, because the damage was caused by the operation of a motor vehicle. See Citizens v Lowery, 159 Mich App at 614. The court rejected defendant's argument, finding that §3135(3)(a) of the No-Fault Act did not abolish tort liability in that case because the *reckless* operation of the stolen vehicle constituted willful and wanton misconduct, which falls within the *intentional acts* contemplated by the exception to the No-Fault Act's immunity found in MCL 500.3135(3)(a). Lowery, 159 Mich App at 617-618.

Citing the Michigan Supreme Court landmark opinion in Gibbard v Cursan, 225 Mich 311, 320, 196 NW 398 (1923), the Court noted that willful and wanton misconduct is in the same class as intentional wrongdoing. See Lowery, 159 Mich App at 617 (citing Gibbard, 225 Mich at 321). The Lowery court also cited the Michigan Supreme Court case, Burnett v City of Adrian, 414 Mich 448, 462-463, 326 NW2d 810 (1982), in support of the proposition that "willful and wanton" misconduct amounts to intentional wrongdoing for purposes of §3135(3)(a). In doing so, the Court in Lowery reasoned as follows:

> Intentionally caused harm to persons or property is an exception to the No-Fault Act's abolishment of tort liability. MCL 500.3135(2)(a); MSA 24.13135(2)(a). (Act has recently been amended in 1995 and is now §(3)(a).) ***Because acts resulting from willful and wanton misconduct fall within the class of intentional acts, Defendant's tort liability in the instant case is not abolished by the No-Fault Act.***

See Lowery, 159 Mich App at 617-618. (Emphasis added.)

In the Court of Appeals, Defendants contended that this case was incorrectly decided. However, to make such an argument, Defendants would have to argue that an entire line of cases coming down from both this Court and the Michigan Court of Appeals improperly interpreted the phrase "willful and wanton." In Burnett v. City of Adrian, 414 Mich 448, 455, 326 N.W. 2d 810 (1982), the Michigan Supreme Court determined that willful and wanton misconduct is "made out only if the conduct alleged shows an **intent** to harm, or if not that, such indifference whether harm will result as to be the equivalent of a willingness that it does." The Court noted that willful and wanton is not a high degree of carelessness but instead a specific intent of indifference which amounts to willingness. As such, the court clearly interpreted the phrase to include an intentional component. Again, the concept of willful and wanton misconduct slides closer to, and even overlaps with, the actual intent point of the continuum of intentional conduct. Id.

More recently in Boumelhem v Bic Corp., 211 Mich App 175, 185, 535 N.W. 2d 574 (1995), this Court determined that "[w]ilful and wanton misconduct is not a high degree of negligence; rather it is in the same class as intentional wrongdoing." These cases set precedent that willful and wanton is synonymous with intentional. Therefore, Defendant's argument that willful and wanton does *not* rise to a level of intentional is contrary to previous cases including opinions issued by this Court, and defeated by the plain language of §3135(3)(a). As evidenced by the above argument, "intentionally caused harm" encompasses

harm caused by willful and wanton conduct as well as recklessness.

Defendant has argued that the Legislature only intended a "true" intentional tort, when it used the words "intentionally caused harm" in the first sentence of §3135(3)(a). Defendant asserted that the statute requires that the person "intend to cause harm." As noted directly above, using the words "willful and wanton" in relation to Defendant York's conduct means that he "intended" to cause the harm. The first sentence of subsection (3)(a) cannot be interpreted in a void. See West Bloomfield Hosp at 523. It must be read in concert with the second sentence and the text of the entire No Fault Act. As explained throughout this brief, the reference to a very specific type of recklessness in the second sentence suggests that recklessness is generally contemplated for purposes of the first sentence. In other words, "intentionally caused harm" includes harm caused by a reckless act.

Defendant unwittingly made this very argument – presumably without realizing it – to the Court of Appeals. Defendant stated in its brief that "the Legislature would have no cause to expressly immunize from liability a person that acts 'know[ing] that harm ... to property is substantially certain in the limited circumstance provided if the statute otherwise did not contemplate such liability generally." This statement precisely crystallizes the reason why "intentionally caused harm," as used in the first sentence, can only be read to include both willful and wanton conduct and recklessness.

Simply because the statute does not utilize the words "willful and wanton" does not mean that such conduct fails to rise to the level of "intentionally caused harm" contemplated by the legislature. The courts cited above are not engrafting a new standard as suggested by Defendant but, instead, defining what is *"intentional"* under the statute in compliance with a strong line of Michigan case law. Defendants overly simplified examination of the text of §3135(3)(a) falls far short of the meaning and interpretation intended by the Legislature.

Moreover, Defendant's reliance on Pavlov v Community Emergency Medical Serv., Inc., 195 Mich App 711, 491 N.W. 2d 874 (1992), is misplaced. In Pavlov, the court was addressing the meaning of the statutory language "gross negligence and willful misconduct." The court determined that use of the "willful and wanton" standard to define "gross negligence" and "willful misconduct" was improper. The Pavlov court's decision is appropriate given that case law has defined willful and wanton as rising to the level of an intentional act and the statute therein only required gross negligence. Clearly, the use of "willful and wanton" to define "gross negligence" went beyond the terms contemplated by the legislature. Defendant's analysis with respect to Pavlov is inapposite and inconsequential.

Subsection (3)(a) uses the term "intentional." Case law has clearly defined willful and wanton as intentional. The plain language of §3135(3)(a) requires a finding that "intentionally caused harm" is broad enough to contemplate harm caused by recklessness. Willful and wanton is nearer to actual intent than

recklessness on the continuum of intentional behavior. Consequently, willful and wanton behavior, as well as recklessness, are included within the scope of "intentionally caused harm" as used in the first sentence of §3135(3)(a). Harm caused by willful and wanton behavior is precisely the kind of conduct the Legislature viewed as worthy of voiding the immunity otherwise extended by the No-Fault Act.

Therefore, neither the trial court nor the Court of Appeals were engrafting a new standard by discussing the concept of "willful and wanton" misconduct. Instead, they were utilizing language that conveyed the same meaning - intentional conduct. The Court of Appeals and trial court's decision in this respect – holding that willful and wanton conduct can be the equivalent of intentional conduct – was proper and should be upheld.

However, the portion of the Court of Appeals decision that gives the phrase "willful and wanton" dual meaning is unnecessary and overly confusing to the analysis at hand, since both willful and wanton and recklessness rise to the level of "intentionally caused harm" contemplated by the Legislature in enacting §3135(3)(a). This Court, as well as the Court of Appeals, has determined that willful and wanton is synonymous with "intentional." A decision providing dual meaning not only goes against precedent but also creates great confusion and an impossible standard by which to judge future cases under §3135(3)(a). Therefore, the portion of the Court of Appeals decision providing a dual meaning for the phrase "willful and wanton" should be reversed.

III. MR. YORK'S CONDUCT WAS INTENTIONAL

Mr. York's conduct was willful and wanton/intentional and should give rise to the exception contained in MCL 500.3135(3)(a). In the Court of Appeals, Defendant argued that intoxication alone does not rise to a level of intentional conduct as required under §3135(3)(a). Defendant cited Miller v. Inglis, 223 Mich App 159, 567 N.W. 2d 253 (1997), in support of this argument. The contention is unpersuasive and does not take into account the unique facts and circumstances presented by this case.

Indeed, Mr. York's case does not parallel other cases where a person merely drives while intoxicated. In this respect, the trial court stated as follows:

> In this case, Mr. York put a plan into place, and that plan was to have his wife pick him up, and he followed through on that plan by calling his wife, and then at some point when or after she arrived he **INTENTIONALLY ABANDONED THE PLAN** and knowing full well his condition was - that of intoxication, and I think there's more than an inference from the facts and from his deposition, there's knowledge of that factor - he then decides to drive.
>
> (Tr, p. 33-34 (emphasis added).
>
> It is the departure from that plan, or the abandonment of it on the part of the Defendant, that resulted in the tragedy in this case and, specifically, what's involved here is the damage to the DVA Ambulance. And this court finds that in deciding to drive solo, to drive that is, to operate his motor vehicle in an apparent condition to him, at least, of intoxication – and I say apparent, and the indicia for that is everything that preceded the calls to his wife to pick him up, that he was at the party, that he had been drinking, that that was the intent – all of that pre-staged this chain and series of events that were in place. So in terms of the statute and the policy, this court feels – and, again, I think the Lowery case is pretty much in point, not because there should be an arbitrary application to all facts

> where there's a drunk or intoxicated driver, but for the reasons I already stated in the Summary Disposition Motion, I feel that in the analysis here there is an application of the exception and in the case before the court there is tort liability here. (Tr, pp. 104-107)
>
> The court finds that the act of driving here on the part of Mr. York was intentional, that under the circumstances that this factual scenario I have laid out here that the intentional act is willful and wanton and, again, in the words of the Gibbard case, 'if one willfully injures another, or if his conduct in doing injury is so wanton or reckless that it amounts to the same thing, he is guilty of more than negligence. (Tr, pp. 104-107)

This ruling points to two factors which take this case outside the realm of a typical drunk driving case. First, Mr. York put a designated driver plan into place with his wife (Tr, p 48). He knew he needed to follow through on the plan because, after drinking a shot of liquor and approximately one to two beers an hour for approximately six (6) hours, he called his wife to come get him. He was, in effect, reemphasizing the need for the plan. (Tr, p 41-42, 55-57).

However, after his wife arrived he made a conscious decision, being aware of his condition after drinking, to abandon the designated plan and drive himself home (Tr, pp 60-63, 82-83). This, in effect, constituted the "intentional" act on York's part. Mr. York intentionally abandoned a plan for safety and drove knowing that he had consumed a lot of alcohol. This act of conscious decision-making takes these facts outside the realm of a typical drunk driving situation into an intentional/willful and wanton class of activity. Mr. York decided to situate himself behind the wheel of a vehicle even though he knew he was intoxicated. He knew of the risk of harm to others; that is why he made arrangements to

avoid driving.

Secondly, as further evidence of this conscious disregard for others' safety, Mr. York passed through a stop sign with which he was admittedly familiar on his way home on the night in question. Testimony revealed that he was intimately familiar with the area and had driven it for more than 15 years (Tr, pp 51-52; Dep, pp. 36-37) He knew the roads and the stop signs. Nevertheless, when he was driving home on December 23, 1997, he chose to disregard the stop sign at the intersection of Garrison and Bryon roads. This conduct was intentional. It came despite his knowledge that an accident would be likely to follow. Defendant's willful and wanton actions fall squarely within the "intentionally caused harm" exception set forth in §3135(3)(a). The Court of Appeals' decision to the contrary should be reversed and the trial court's determination reinstated.

IV. STRICT CONSTRUCTION OF LAWS AGAINST DRUNK DRIVERS IS CONSISTENT WITH SOUND, ESTABLISHED PUBLIC POLICY IN MICHIGAN.

Michigan's landscape of drunk driving laws is among the toughest in the nation. See People v Brown, 445 Mich 866, 519 NW 2d 843 (1994) (Opinion by Levin, J.). In 1991, the Legislature amended the Motor Vehicle Code to provide that a person who operates a motor vehicle under the influence of intoxicating liquor and causes the death of another person is guilty of a felony punishable by imprisonment for not more than fifteen years. See MCL 257.625; MCL 750.321 – 326. In 1995, the Legislature restricted a drunk driver's ability to sue for wrongful

death and personal injury, where said driver's intoxication was more than 50% the cause of the accident giving rise to the lawsuit. See MCL 600.2955a.

More recently, in 2003, the Legislature lowered the legal limit for blood alcohol content from .10 to .08, thereby evidencing its desire to further curtail drinking and driving. A civil judgment against a drunk driver is not dischargeable in bankruptcy. See, e.g., In re Felski, 277 BR 732 (ED Mich 2002).

Certain other states have adopted equally stringent laws against drunk drivers. Courts in Alabama and Tennessee have held that a drunk driver who kills another person may be said to have acted with malice where he drove recklessly while intoxicated and was involved in an accident in which a person was killed. Where a defendant in Tennessee became drunk despite an awareness that he would have to drive home, the Supreme Court of that state observed as follows:

> It is inconceivable that a man can get as drunk as [defendant] was on that occasion without previously realizing that he would get in that condition if he continued to drink. But he did continue to drink and presumably with knowledge that he was going to drive his car back to, or close to Lebanon over this heavily traveled highway. He knew, of course, that such conduct would be directly perilous to human life. From his conduct in so doing, it was permissible for the jury to imply "such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

Edwards v State, 202 Tenn 393, 398, 304 SW 2d 500 (1957).

It is consistent with established policy in Michigan to interpret §3135(3)(a) in a manner that does not extend No-Fault immunity to individuals who drive drunk. Surely, such individuals can be said to act with "such a high degree of

conscious and willful recklessness" as to except them from tort immunity extended by the No Fault Act. When Mr. York got in his car, he knew, just as the Tennessee driver knew, that his conduct would be "directly perilous to human life." Yet, he made the conscious decision to drive anyway. Such a callous disregard for the safety of others is precisely the kind of "intentional" act the Michigan Legislature contemplated when it enacted §3135(3)(a). Drivers who are culpable for operating a vehicle while intoxicated are not entitled to No-Fault immunity in Michigan.

V. CONCLUSION

The plain language of the statute, the substantial thrust of Michigan case law and sound public policy all militate in favor of a finding that drunken drivers who intentionally and knowingly get behind the wheel of a car are not entitled to No-Fault immunity. This Court should grant leave to correct the clear error below, and properly effectuate the intent of the Legislature in enacting §3135(3)(a).

BLANCO MILLER, P.C.

Orlando Blanco

ORLANDO L. BLANCO (P34480)
KEVIN E. SRALLA (P61024)
Attorneys for Plaintiffs/Appellants

Dated: December 3, 2003